81-2151

No.

Supreme Court, U.S.
FILED
MAY 21 1982
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

PETROCHEMICAL ENERGY GROUP,
Appellant,

v.

CONSUMER ENERGY COUNCIL OF AMERICA, ET AL.,
Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

JURISDICTIONAL STATEMENT

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May 21, 1982

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QUESTIONS PRESENTED

1. Whether the court of appeals erred by finding that the legislative review provision in Subsection 202(c) of the Natural Gas Policy Act of 1978, 15 U.S.C. § 3342(c), is severable from the remainder of Section 202 of that Act.

2. Whether the court of appeals erred by finding the Federal Energy Regulatory Commission's revocation of the rule it had announced in its Order No. 80, which rule the United States House of Representatives had previously disapproved pursuant to the legislative review provision of Subsection 202(c) of the Natural Gas Policy Act of 1978, was procedurally invalid under the Administrative Procedure Act, 5 U.S.C. § 553(b) and (c).

3. Whether the court of appeals erred by ordering that Order No. 80 was to be placed into effect, subject to Commission action to the contrary, inasmuch as Order No. 80 was arbitrary and capricious, an abuse of the Commission's discretion and unsupported by substantial evidence.

PARTIES BELOW *

Appellants in this case, all of whom participated in the case below are:

Petrochemical Energy Group
Process Gas Consumers Group
American Gas Association
Georgia Industrial Gas Group
American Iron and Steel Institute
Interstate Natural Gas Association of America
United Distribution Companies
Federal Energy Regulatory Commission

In addition, the other parties below were:

Consumer Energy Council of America
Consumer Federation of America
Public Citizen
The United States Senate (Amicus)
The United States House of Representatives (Amicus)
The United States of America (Amicus)

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* The Petrochemical Energy Group consists of the following companies: Borden Chemical; Borg-Warner Chemicals; Celanese Corporation; Chemplex Company; The Dow Chemical Company; The Firestone Tire & Rubber Company; The B.F. Goodrich Company; The Goodyear Tire & Rubber Company; Hercules Incorporated; Monsanto Company; National Distillers & Chemical Corp.; Olin Corporation; PPG Industries, Inc.; Rohm and Haas Company; Texas Eastman Company, Division of Eastman Kodak Company; and Union Carbide Corporation. At the time that PEG intervened in this case in the court of appeals, E. I. du Pont de Nemours & Co., Inc.; Georgia-Pacific Corporation; and Publicker Industries, Inc. were also members.

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JURISDICTIONAL STATEMENT

INTRODUCTION

The Petrochemical Energy Group (PEG) hereby submits its Jurisdictional Statement pursuant to Rules 12 and 15 of the Rules of the Supreme Court in the above-referenced action. PEG appeals from the final judgment, dated January 29, 1982, of the United States Court of Appeals for the District of Columbia Circuit, holding unconstitutional the legislative review provision in Subsection 202(c) of the Natural Gas Policy Act of 1978 (NGPA), 15 U.S.C. § 3342(c), and ordering Order No. 80 of the Federal Energy Regulatory Commission (FERC) reinstated subject to reconsideration by FERC.

OPINIONS AND ORDERS BELOW

The decision of the United States Court of Appeals for the District of Columbia Circuit in *Consumer Energy Council of America et al.* v. *Federal Energy Regulatory Commission,* Nos. 80-2184 and 80-2312 is not yet reported.

A copy of the slip opinion is set out in the Appendix at pp. 1a-104a.[1] The court's denial of rehearing, dated March 10, 1982, appears at p. 210a of the Appendix.

FERC Order No. 80 issued May 6, 1980 is published in 45 Fed. Reg. 31622 (May 13, 1980) and is set out at pp. 123a-195a of the Appendix. FERC's orders denying rehearing of Order No. 80, issued on August 1 and October 2, 1980, appear in the Appendix at pp. 196a-203a and 204a-207a, respectively.

JURISDICTION

The judgment of the court of appeals, which appears at pp. 208a-209a of the Appendix, was entered on January 29, 1982. A petition for rehearing was filed by The American Gas Association on February 26, 1982. The court of appeals denied this petition on March 10, 1982. The order denying rehearing is at p. 210a of the Appendix.

The jurisdiction of this Court arises under 28 U.S.C. § 1252 because the judgment of the court of appeals held unconstitutional 15 U.S.C. § 3342(c), a portion of an Act of Congress of the United States of America. Pursuant to that statutory authority and pursuant to 28 U.S.C. § 2101 (a) and Rule 11.3 of the Rules of the Supreme Court, PEG filed a Notice of Appeal, a copy of which is attached at pp. 217a-218a, in the United States Court of Appeals for the District of Columbia on March 25, 1982. This appeal is being docketed in this Court within 60 days of the filing of the Notice of Appeal.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The statute upon which the court of appeals' decision is based is the Natural Gas Policy Act of 1978 (NGPA),

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[1] All references to the Appendix are to the Appendix to the Jurisdictional Statement submitted April 29, 1982, by the Process Gas Consumers Group, et al., in a related case, No. 81-2008.

15 U.S.C. §§ 3301-3432, the relevant portions of which appear at pp. 224a-231a.

The provisions of the Constitution of the United States specifically involved are Article I, Sections 1, 7 and 8; Article II, Sections 1 and 3; and Article III, Sections 1 and 2. The relevant portions of these provisions are set out at pp. 222a-224a.

STATEMENT OF THE CASE

The instant case focuses on the constitutionality of the legislative review provision in Subsection 202(c) of the NGPA and the effectiveness of a rule disapproved, or "vetoed", by the House of Representatives pursuant to that Subsection and subsequently revoked by the Commission.

Title II of the NGPA established a natural gas pricing program under which a disproportionately greater share of certain costs of higher priced gas acquired by interstate pipelines is charged to certain industrial gas users, rather than to other gas users. Under the program (hereinafter referred to as incremental pricing), a two-stage process was undertaken to determine those industrial users of natural gas to be subject to higher (or incremental) prices.

Section 201 of the NGPA, 15 U.S.C. § 3341, covers the first part of the program. This Section *requires* the Commission to promulgate, within 12 months after enactment of the NGPA, a rule applying an incrementally higher gas price to non-exempt industrial boiler fuel customers of interstate pipelines.[2]

Section 202 of the NGPA, 15 U.S.C. § 3342, provides that the Commission consider within 18 months of enactment of the NGPA, an amendment to the incremental pricing program established under Section 201. In this second stage of the program FERC is empowered to select

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[2] *See* 18 C.F.R. Part 282 (1980).

additional categories of industrial gas users to be covered. According to Subsections 202(a)(2) and 202(c), however, any such amendment is to become effective only if neither House of Congress votes to disapprove the rule within 30 days of its submission to Congress.

On November 15, 1979, FERC initiated proceedings pursuant to Section 202 of the NGPA by issuing a Notice of Proposed Rulemaking in Docket No. RM80-10. Extensive hearings on the proposed rule were held at various locations across the country and public comments were received. On May 6, 1980, the Commission issued Order No. 80 proposing an amendment to its incremental pricing rules promulgated under Section 201. The proposed amendment was submitted to Congress on the same day.

A Resolution of Disapproval, House Resolution 655,[3] was introduced in the House of Representatives and referred to the House Committee on Interstate and Foreign Commerce. On May 12, 1980, the Committee submitted a report entitled *Incremental Pricing of Natural Gas*,[4] in which it recommended passage of House Resolution 655. The Resolution went to the House Floor on May 20, 1980 and was adopted that day by a vote of 369-34.[5]

On June 5, 1980, the Consumer Energy Council of America, Consumer Federation of America, and Public Citizen (hereinafter collectively referred to as "CECA") petitioned FERC for rehearing of Order No. 80. The petition asked that the Order be made effective, even though FERC had made it contingent on Congressional approval under Section 202(c), on grounds that the House vote of disapproval and Section 202(c) are unconstitutional.

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[3] H.R. Res. 655, 96th Cong. 2d Sess., 126 Cong. Rec. H 3855 (daily ed. May 20, 1980), set forth at p. 222a.

[4] H.R. Rep. No. 96-938, 96th Cong., 2d Sess. (May 12, 1980), set forth at pp. 107a-195a.

[5] 126 Cong. Rec. H3855 (daily ed. May 20, 1980).

FERC denied this petition for rehearing and revoked Order No. 80. *See* pp. 196a-203a. Upon denial of rehearing of the revocation order, *see* pp. 204a-207a, CECA sought review of FERC's orders in the United States Court of Appeals for the District of Columbia Circuit.

PEG intervened in support of FERC before the court of appeals. PEG took no position with respect to the underlying constitutional issue raised by CECA. Instead, PEG argued that the court of appeals need not reach the constitutional issue raised by CECA because, regardless of its outcome, CECA could not be given the relief it seeks. First, PEG argued that Subsection 202(c) was not severable from the remainder of Section 202. Accordingly, even if CECA prevailed on the constitutional issue, the whole of Section 202 would necessarily fall with Subsection 202(c), depriving any amendment issued under Section 202 of its statutory predicate. Second, PEG asserted that Order No. 80 was of no legal effect even if Section 202(c) is severable because the order had been lawfully revoked by FERC. Finally, even if FERC's revocation is invalid, Order No. 80 itself is invalid because it is not the product of reasoned decision making.

On January 29, 1982, the court of appeals handed down its decision, holding unconstitutional Subsection 202(c) and the action of the House of Representatives in disapproving the rule issued in Order No. 80.

In reaching the constitutional question, the court necessarily resolved two preliminary issues. First, the court held that Subsection 202(c) was severable from the remainder of Section 202. Second, the court of appeals ruled that FERC's revocation of Order No. 80 was procedurally invalid under the Administrative Procedure Act, 5 U.S.C. §§ 553(b) and (c). The court of appeals declined to rule, however, on whether Order No. 80 itself was invalid. Accordingly, the court of appeals ordered Order No. 80 placed into effect, subject to reconsideration by FERC.

On February 26, 1982 PEG filed its Notice of Appeal to this Court. However, on the same day, a petition for rehearing was filed by another party to the proceeding below. The petition was denied on March 10, 1982, *see* p. 210a, and PEG refiled its Notice of Appeal to this Court on March 25, 1982. See pp. 217a-218a.

THE QUESTIONS ARE SUBSTANTIAL

PEG does not here either challenge or support the decision of the court of appeals regarding the constitutionality of the one-house legislative veto. Rather, it is PEG's position that the court of appeals, having sound alternative, non-constitutional grounds to resolve the case, need never have reached the constitutional issue.[6] However, in the event this Court first resolves the constitutional issue and affirms the court of appeals on that question, this Court should nevertheless reverse the court of appeals on the non-constitutional questions. If the Court finds the one-house veto unconstitutional in this case, resolution of these other questions becomes necessary in order to avoid substantial economic disruption to both consumers and suppliers of natural gas.

1. The court of appeals erred in holding Subsection 202(c) severable from the remainder of Section 202.

Even if the court of appeals is correct in holding the one-house veto provision of Subsection 202(c) unconstitutional, the court erred in finding that FERC retained authority under Section 202 to promulgate Order No. 80. Section 202 is an inseverable whole; it may not be partially struck down without doing violence to congressional intent. Accordingly, in the event that this Court upholds the court of appeals regarding the constitutional issue, all of Section 202 must be found invalid, depriving Order No. 80 of its statutory predicate.

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[6] Spector Motor Service v. McLaughlin, 323 U.S. 101, 105 (1944), quoted in New York Transit Authority v. Beazer, 440 U.S. 568, 582 (1979).

No severability clause exists in the NGPA. In the absence of such a clause, the presumption is against severability.[7] The express terms of the NGPA, as well as its legislative history, demonstrate that this presumption cannot be overcome in this case. Only the first stage of incremental pricing is mandatory. The ultimate decision regarding expansion of incremental pricing in the second stage was left to the discretion of Congress by means of the legislative veto provision in Subsection 202(c). If the court of appeals is correct in its conclusion that the veto provision is unconstitutional, the remainder of Section 202 must also be struck down in order to preserve congressional intent to withhold ultimate decision making responsibility from FERC. Since a finding that Section 202(c) is severable would result in "a program quite different from the one legislature actually adopted", this Court should reverse the court of appeals and invalidate the entire Section 202.[8]

2. Even if Subsection 202(c) is severable, the court of appeals erred in holding invalid FERC's revocation of Order No. 80.

Even if the court should uphold the court of appeals on the severability issue, Order No. 80 cannot be made effective. The court of appeals erred in finding invalid FERC's revocation of that Order.

The court of appeals found FERC's revocation order procedurally defective under the APA, 5 U.S.C. § 553(b) and (c), holding that prior to revocation, FERC should have afforded parties notice and an opportunity to comment on the revocation. Neither the NGPA nor the APA requires such action.

The revocation order was issued as part of FERC's order on rehearing of Order No. 80. Prior to revocation, the Order had never been made final and effective. It remained

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[7] *See,* Carter v. Carter Coal Company, 298 U.S. 238, 312 (1936).

[8] Sloan v. Lemon, 413 U.S. 825, 834 (1973).

subject to rehearing and, by the express terms of Subsection 202(a)(2) of the NGPA, could never become effective in the event it was disapproved by Congress. Accordingly, in revoking the Order, FERC was not repealing a final and effective rule. Nothing in the APA prohibits withdrawing a rule before it becomes final without prior notice and comment.

Moreover, in exercising its power to amend the incremental pricing rules pursuant to Section 202(a)(2), FERC revoked Order No. 80 upon the record developed during FERC's consideration of the amendment. All interested persons had notice of, and had an opportunity to present written and oral views on, the proposed amendment. Having concluded that the record would not support the proposal, FERC properly revoked it.

FERC's reliance on the earlier record in order to revoke the Rule, without an additional round of notice and comment, is specifically sanctioned by the NGPA and judicial precedent under the APA. In acting upon an application for rehearing, FERC is expressly empowered to grant or deny rehearing or modify the original order without further hearing, NGPA Section 506(a)(2), 15 U.S.C. § 3416 (a)(2). This authority is bottomed on the sound policy that FERC be permitted to rectify errors on its own before judicial intervention is sought.

Similar policy considerations demonstrate the propriety of FERC's actions under the APA. An agency is under no obligation to provide new opportunities to comment in the event it decides to modify a proposed rule based upon the record developed during a rulemaking proceeding. Under Section 202 FERC had discretion to propose those categories of industrial users to be subject to incremental pricing in addition to the industrial boiler fuel users covered by the first stage of the program. Interested parties had full notice that one option for comment was to include no additional categories of users, and many parties actually sub-

mitted views on the subject. A second round of comment on that option, therefore, was not required.

3. Order No. 80 is invalid because it is not the product of reasoned rulemaking.

If the Court affirms the court of appeals in finding both that Section 202(c) is severable from the remainder of Section 202 and that FERC's revocation of Order No. 80 is invalid, the Court should nevertheless set aside Order No. 80 itself as arbitrary, capricious, an abuse of discretion and unsupported by substantial evidence in the record.

Believing that Congress had retained for itself the ultimate policy decision on whether an expansion of the incremental pricing program would be appropriate, FERC acknowledged that it had not considered all the arguments presented on the issue and thus had "not yet independently evaluated whether the phase two rule meets the social and economic goals of the Title II incremental pricing program."[9] This admitted failure to exercise reasoned decision making is a conclusive basis to invalidate Order No. 80. Accordingly, the Order should be held void *ab initio*.

4. The issues in this case require plenary consideration.

The issues discussed herein are important matters that should be resolved by this Court if it decides to uphold the court of appeals in finding unconstitutional the one-house veto exercised by the House of Representatives in this case.

Excising the Congressional veto power in this case necessarily raises the critical question of the scope of FERC's authority, if any, under Section 202 to expand the incremental pricing program to industrial non-boiler fuel users.

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[9] Order Denying Rehearing and Revoking Amendment Made by Order No. 80, at p. 199a.

The question of severability is of course essential to this inquiry. If Subsection 202(c) is inseverable from the remainder of Section 202, the Court need go no further because FERC's underlying statutory authority to issue Order No. 80 or any other rule would be removed. However, if Subsection 202(c) is found severable, the court's inquiry should not end.

The decision of the court of appeals would place Order No. 80 into effect, unless FERC acts to amend it. Accordingly, the findings of the court of appeals regarding the effectiveness of that Order must be resolved by the Court. The Court must first review the validity of the FERC order revoking Order No. 80. In turn, if the revocation of Order No. 80 is found invalid, the validity of Order No. 80 itself must be examined.

Order No. 80 poses the potential for substantial economic injury to gas suppliers and consumers. Those non-constituted questions regarding the effectiveness of Order No. 80 raised by PEG must, therefore, be resolved in the event this Court affirms the court of appeals in holding unconstitutional the legislative veto exercised in this case.

CONCLUSION

For these reasons, this Court should note probable jurisdiction of this appeal.

Respectfully submitted,

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